understand that the present Examiner is not going to comment on the merits of the Florida patents and applicants have no wish to belabor this point, it is believed essential that the issue of patentable distinctness be resolved under the appropriate legal standard. Such is essential to determine whether the Florida patents can be overcome by declaration or by interference. In addition, insofar as scope of the present claims vis a vis that of the Florida patents may be relevant to issues of enablement, applicants would like to know what the difference in scope is believed to be, so that applicants might consider appropriate claim amendments that reduce or eliminate issues of enablement.

According to 37 CFR 1.601(n), "invention A is the same patentable invention as invention 'B" when invention 'A: is the same as (35 USC 102) or is obvious (35 USC 103) in view of invention 'B' assuming invention 'B' is prior art with respect to invention 'A'". MPEP 2306.01 further provides that:

> It should be emphasized that the requirement that the claims of the application and of the patent define the same patentable invention in order for an interference to exist does not mean that the application claim or claims must necessarily be identical to the corresponding claim or claims of the patent. All that is required under present practice is that a claim of the application be drawn to the same patentable invention as a claim of the patent. An application claim is considered to be drawn to the same patentable invention as a patent claim if it recites subject matter which is the same as (35 USC 102) or obvious in view of (35 USC 103) the subject matter recited in the patent claim.

It is believed that the office action's view that all claims in the present application are patentably distinct from claims in the '937 and '360 patents results from applying a test of strict identity. As indicated above, such is not the correct test for whether claims are directed to the same patentable invention. Applicants request that this issue be reevaluated under the standard given above. To facilitate this review, two representative claims, one from the present case, and one from the patent are shown below side-by-side with differences in wording shown in italics.